ity of the shareholders of the first respondent is in favour of what he has done, the petitioner's right to question such action no longer exists. To get around this, the second respondent suggests that nothing short of the petitioner filing another writ by way of a derivative action will suffice in the circumstances of this case. By so pleading, the second respondent is in fact giving recognition to the rule in *Foss* v *Harbottle*.[1]

The injured party in this action is the first respondent and s 181(1) and (2) of the Companies Act 1965, under which this petition is presented and relief sought, was specially enacted to overcome the problem posed by *Foss* v *Harbottle*,[1] and to strengthen the position of the minority shareholders in limited companies. Since there is now statutory sanction for a shareholder with a minority interest in a company to institute proceedings against directors from conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner in the manner suggested by the second respondent as that would amount to a duplicity of actions relating to the same subject matter.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[2] the Privy Council held that under s 181(2) the courts have a wide and an unfettered discretion as to the reliefs they may grant which are in no way limited to those listed in sub-s (2)(a)-(e). Since a claim for a damages against the second respondent would be a natural consequence should the wrong acts complained of by the petitioner be established, I had concluded that the particular amendment objected to by the second respondent should not prejudice him in any way and that it is necessary in the circumstances to enable the court to determine the issues in dispute between the parties. To that end, I had affirmed the order of the senior assistant registrar allowing the petitioner's application to amend the petition and accordingly dismissed the second respondent's appeal with costs.

Order accordingly.

Solicitors: *Skrine & Co*; *Cheang & Ariff*.

Reported by *Ng Sheau Jiuan*

Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-1169-86
SITI NORMA YAAKOB J
27 JULY 1988

Contract – Guarantee – Guarantee executed after advance of credit facilities – Whether consideration was past – Whether guarantee was a continuing guarantee

Banking – Guarantee – Guarantee executed after advance of credit facilities – Whether consideration was past – Whether guarantee was a continuing guarantee

The third defendant, who was sued as a guarantor pursuant to two guarantees, applied to set aside a judgment in default entered against him. He contended that as the guarantees were executed after the credit facilities were advanced to the first defendant, they contained past consideration and as such were not enforceable against him. It was also submitted that the judgment in default was entered for sums in excess of that claimed in the statement of claim.

Held, dismissing the application: (1) A continuing guarantee, such as the one in this case, includes guaranteeing not only facilities existing at the time of execution of the guarantee but also facilities to be made in the future. As such, there is good consideration given to both the continuing guarantees.

(2) Clause 8 of both guarantees is a conclusive evidence clause, the effect of which is that any statement issued by the plaintiff as to the amount due from the first defendant is conclusive evidence of the third defendant's indebtedness as a guarantor. Such a statement was issued by the plaintiff wherein the principal sum stated is less than the total limits of the two guarantees.

(3) The third defendant's tardiness in pursuing his rights has greatly prejudiced the plaintiff as it had incurred expenses in executing the judgment. The application to set aside is therefore dismissed.

Cases referred to

1 *Heng Cheng Swee* v *Bangkok Bank Ltd* [1976] 1 MLJ 267 (folld)
2 *Chew Soon Tat* v *Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 (distd)
3 *Perwira Habib Bank Malaysia Bhd* v *Foo Ah Chai* 1987 BLD [Aug] 494 (distd)
4 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)

T Selvendranathan for the third defendant/appellant.
WM Chang for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: In his application to set aside a judgment in default entered against him on 31 December 1986, the third defendant, who is sued as a guarantor pursuant to two guarantees, raised the following issues to establish that he has a defence on the merits:

(1) The two guarantees contain past consideration and as such are unenforceable against him.

(2) The judgment in default is entered for sums in excess of that claimed in the statement of claim.

At the material time the third defendant was a director of the first defendant, and together with another director, the second defendant, had given two separate personal guarantees that they will repay within two days of demand all moneys which shall be due to the plaintiff in consideration of the plaintiff making or continuing advances or giving or continuing credit or banking facilities to the first defendant. The limit of the first guarantee dated 17 July 1984 is $285,000 whilst that of the second guarantee dated 24 January 1985 is $150,000.

As at the date of the first guarantee, the plaintiff had already approved banking facilities to the first defendant in the form of a term loan for $90,000 which was disbursed on 10 July 1984 and an overdraft facility of $150,000 which was advanced from time to time. The terms and conditions for these facilities are contained in a letter of offer dated 12 June 1984.

On 4 January 1985, the plaintiff further approved the first defendant's application for a temporary excess overdraft of $150,000 over the $150,000 granted earlier. This was followed on 25 January 1985 by the plaintiff granting another temporary overdraft of $40,000 to the first defendant. A day before that, the second guarantee was executed.

The consideration for both guarantees is stated in the preamble of the guarantees as follows:

> In consideration of your (ie the plaintiff) making or continuing advances or otherwise giving or continuing credit or making banking facilities (including the issue of guarantee by you) to Fast Travel (M) Sdn Bhd hereinafter called the principal, we jointly and severally guarantee ...

A continuing guarantee such as the one in this case has been held in the case of *Heng Cheng Swee* v *Bangkok Bank Ltd*[1] to include guaranteeing not only facilities existing at the time of the execution of the guarantee but also facilities to be made in the future. As such there is good consideration given to both the continuing guarantees. A continuing guarantee is quite unlike the guarantee that was decided in the case of *Chew Soon Tat* v *Malaysia National Insurance Sdn Bhd*[2] and the one considered in *Perwira Habib Bank Malaysia Bhd* v *Foo Ah Chai*.[3] They are not continuing guarantees.

Clause 8 of both guarantees contains similar provisions and are very much akin to the conclusive evidence clause that was decided in *Citibank NA* v *Ooi Boon Leong & Ors*.[4] The effect of such a clause is that any statement issued by the plaintiff as to the amount due from the first defendant is conclusive evidence of the third defendant's indebtedness as a guarantor. Such a statement was issued by the plaintiff on 11 April 1988, wherein the principal is stated to be $426,861.45 which is less than the total limits of the two guarantees.

The two rates of interest claimed at 9% and 16.5% pa are the agreed and permissible rates of interest under the letter of offer dated 12 June 1984 as the first defendant had also permitted the plaintiff, at its discretion, to raise the interest from 9% to 16.5% pa under the letter of offer.

Lastly, the third defendant had also dragged his feet to get his application disposed of as soon as possible. The judgment in default was entered on 31 December 1986 and the third defendant was notified of it by letter dated 30 April 1987. The application to set aside was filed on 3 May 1987 after which the plaintiff had issued a writ of seizure and sale dated 5 May 1987 and the instant application was fixed for hearing on 26 October 1987. At the instance of the third defendant, the application was postponed twice before it finally came before me on 13 April 1988, by which time, the third defendant's premises had already been attached on 4 April 1988. There can be no doubt whatsoever that the third defendant's tardiness in pursuing his rights had greatly prejudiced the plaintiff as it had incurred expenses in executing the judgment.

The fact of this delay coupled with the all-important consideration that there are no merits to the defence, prompted me to dismiss the third defendant's application to set aside the judgment in default of appearance dated 31 December 1986, with costs.

Order accordingly.

Solicitors: *KL Wong & Co*; *Mah-Kok & Din*.

Reported by *Ng Sheau Jiuan*

Mohammad bin Baee v Pembangunan Farlim Sdn Bhd

HIGH COURT (TEMERLUH) – CIVIL SUIT NO 130/85
KC VOHRAH J
16 JULY 1988

Contract – Sale of house by housing developer – Non-delivery of house – Breach of sale and purchase agreement – Housing developer under receivership – Whether specific performance should be granted – Specific Relief Act 1950, ss 11, 20, 21

Companies and Corporations – Defendant company in receivership – Whether specific performance should be granted – Personal liability of receiver – Companies Act 1965, s 183

On 13 January 1979, the plaintiff entered into a sale and purchase agreement with the defendant company, a housing developer, to purchase in a housing estate which the defendant company was developing a lot together with a single-storey house to be erected thereon. The defendant expressly covenanted and agreed that the construction of the house would be